BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

GARY D. OGDEN	)	
Claimant	)	
VS.	)	
	)	Docket No. 230,945
EVCON INDUSTRIES	)	
Respondent	)	
AND	)	
	)	
INSURANCE COMPANY, STATE OF PENN.	)	
Insurance Carrier	)	

ORDER

The respondent and its insurance carrier appealed the July 27, 1999 Award entered by Administrative Law Judge Nelsonna Potts Barnes. The Appeals Board heard oral argument in Wichita, Kansas, on December 10, 1999.

APPEARANCES

Thomas E. Hammond of Wichita, Kansas, appeared for the claimant. Richard J. Liby of Wichita, Kansas, appeared for the respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

ISSUES

This is a claim for a November 21, 1997 accident and the resulting injury to the left leg. After finding the results of a drug test inadmissible, the Judge concluded that the respondent and its insurance carrier had failed to prove that claimant's alleged drug use contributed to his injury. Finding a 16 percent functional impairment to the left leg, the Judge awarded permanent partial disability benefits for that scheduled injury.[1] Additionally,

[1] See K.S.A. 1997 Supp. 44-510d.

the Judge found that claimant was entitled to receive temporary total disability benefits for the period from January 10, 1998, through March 2, 1998.

The respondent and its insurance carrier contend the Judge erred by failing to allow the results of a drug screen and by finding that the functional impairment to claimant's leg was 16 percent. Although the Workers Compensation Act requires six facts to be proven before the results of a chemical test can be admissible evidence,[2] the respondent and its insurance carrier argue that they are not required to prove any of those facts as they are not attempting to use the drug test solely to prove impairment. Alternatively, if they are required to prove those six facts, the respondent and its insurance carrier argue that they have proven both probable cause for taking the test sample and that the test sample was taken by a licensed health care professional. They argue that probable cause exists because the respondent has a policy requiring drug screening whenever anyone is injured. They argue that the person who collected the test sample should be considered a licensed health care professional as he was employed by a licensed facility.

The respondent and its insurance carrier contend that claimant's request for benefits should be denied. Alternatively, they argue that claimant's functional impairment is only five percent to the leg.

Conversely, the claimant contends the award should be increased. The claimant argues that the Judge correctly ruled that the results of the drug screen are inadmissible as the respondent allegedly lacked probable cause to conclude that claimant was impaired at the time of the accident and, in addition, that the test sample was not collected by a licensed health care professional. Finally, the claimant argues that, if admitted, the drug screen results should be given little weight as there is no way to correlate the test results from a urine sample to any level of impairment. The claimant requests an award for a 27 percent permanent partial disability to the leg.

The only issues before the Appeals Board on this appeal are:

1. Are the results from the drug screen admissible?

2. Did drug use contribute to claimant's injury?

3. What is the nature and extent of claimant's injury and disability?

FINDINGS OF FACT

After reviewing the entire record, the Appeals Board finds:

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[2] K.S.A. 1997 Supp. 44-501(d)(2).

1. On November 21, 1997, Gary D. Ogden fractured his left leg while working for Evcon Industries. The injury occurred when Mr. Ogden attempted to push a maintenance scooter out of the way of his forklift with his left leg and the forklift lunged forward.

2. Immediately after the accident, Mr. Ogden was taken to Wesley Medical Center's emergency room. While at the medical center, Mr. Ogden gave a urine sample for drug screening. The sample was collected and labeled by Mr. John Tully, who is not licensed as a health care professional.

3. Evcon Industries has a company policy that requires every injured worker to undergo a drug test. Mr. Ogden's drug test was requested because of that company policy and not because the company had a reasonable suspicion to believe that Mr. Ogden was impaired by drugs or alcohol at the time of the accident. Mr. Ogden contests the admissibility of the drug screening results.

4. In attempting to prove that Mr. Ogden's alleged drug use contributed to his accident and injury, Evcon Industries and its insurance carrier deposed Dr. Timothy M. Scanlan. Dr. Scanlan testified that he believed marijuana use contributed to Mr. Ogden's accident. In reaching that conclusion, Dr. Scanlan considered the results from the disputed drug screen. Without considering those test results, the doctor admitted that he would probably be unable to draw a conclusion.

5. The parties also deposed Dr. Randy Lynn, the co-director of the laboratory where Mr. Ogden's urine was tested. Dr. Lynn testified that there is no way an individual can correlate the results from a urine sample to any level of impairment as the results are dictated by an individual's level of hydration. The doctor testified:

> There's no way that you can correlate it [the urine sample] to any sort of level of intoxication. Marijuana has been reported to stay present in the body for -- using our cut-offs, 50 and 10 -- approximately two weeks if you're a chronic user. If you're a recreational user, that's going to be more along the lines of a three-to-five day time frame or time window prior to donating the urine specimen. Every individual metabolizes the marijuana differently. With different levels of hydration, the concentrations are either going to increase or decrease. In other words, if you have a concentrated urine, you're going to have a higher concentration than if you drank a lot of water right before donating the urine specimen, you could potentially decrease those urine concentrations. **So, urine is not going to tell you any levels of intoxication associated with an individual, just that prior to donating it they did use those compounds.** (Emphasis added.)

6. Averaging the five percent rating provided by Dr. Robert Eyster with the 27 percent provided by Dr. Pedro Murati, the Judge found that Mr. Ogden sustained a 16 percent

functional impairment to the left leg as a result of the November 1997 accident. The Appeals Board agrees with that finding.

7. Reviewing Dr. Eyster's office notes, the Judge found that Mr. Ogden was entitled to receive an additional seven weeks of temporary total disability benefits for the period from January 10, 1998, through March 2, 1998. The Appeals Board agrees with the Judge's analysis and also finds that Dr. Eyster intended that Mr. Ogden not work until after he was released to regular duties on March 2, 1998.

CONCLUSIONS OF LAW

1. The Award should be affirmed.

2. The November 1997 accident occurred while Mr. Ogden was working for Evcon Industries. The accident arose out of and in the course of Mr. Ogden's employment.

3. For the reasons set forth below, the drug screen results are not admissible and, therefore, should not be considered in this proceeding. Because Dr. Scanlan's opinion that Mr. Ogden was impaired by drugs at the time of the accident was premised upon the drug screen results, that opinion is likewise inadmissible.

4. The Workers Compensation Act restricts the admission of drug screen test results. The Act requires that six facts must be proven before drug test results can be admitted into evidence:[3]

> (A) There was probable cause to believe that the employee used, had possession of, or was impaired by the drug or alcohol while working;
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> (B) the test sample was collected at a time contemporaneous with the events establishing probable cause;
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> (C) the collecting and labeling of the test sample was performed by a licensed health care professional;
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> (D) the test was performed by a laboratory approved by the United States department of health and human services or licensed by the department of health and environment, except that a blood sample may be tested for alcohol content by a laboratory commonly used for that purpose by state law enforcement agencies;

[3] K.S.A. 1997 Supp. 44-501(d)(2).

> (E) the test was confirmed by gas chromatography, gas chromatography-mass spectroscopy or other comparably reliable analytical method, except that no such confirmation is required for a blood alcohol sample; and
>
> (F) the foundation evidence must establish, beyond a reasonable doubt, that the test results were from the sample taken from the employee.

5. The Workers Compensation Act does not define probable cause. The Appeals Board believes the phrase means having sufficient information to lead a reasonable person to conclude that there is a substantial likelihood that drugs or alcohol were either used by or impaired the injured worker.[4]

6. The evidence fails to establish that at the time of the taking of the urine specimen Evcon Industries had probable cause to believe that Mr. Ogden had either used, had possession of, or was impaired by drugs or alcohol while at the time of his accident. The manner in which an accident occurs may be considered in determining whether there is probable cause to believe that a worker was impaired at that time. But standing alone, Mr. Ogden's accident would not lead a reasonable person to conclude that he was impaired when he attempted to push the maintenance scooter aside. Therefore, the Appeals Board concludes that Evcon Industries lacked probable cause to request the drug screen.

7. Evcon Industries and its insurance carrier argue that probable cause exists because the company requires a drug test every time a worker is injured. The Appeals Board disagrees. The Board concludes that probable cause is determined by looking at the facts known by the employer at the time the drug screen is requested. If those facts do not establish probable cause to believe the injured worker had been using drugs or was impaired at the time of the accident, the results from the drug screen are inadmissible and the company's policy concerning drug screens carries little weight.

8. The results of the drug screen are also inadmissible as the record fails to establish that the test sample was taken by a licensed health care professional, as the Act specifically requires.[5]

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[4] See Lindenman v. Umscheid, 255 Kan. 610, 875 P.2d 964 (1994) and *In re* Estate of Campbell, 19 Kan. App. 2d 795, 876 P.2d 212 (1994), both of which define probable cause in the context of civil proceedings. In Lindenman, the Kansas Supreme Court defined probable cause in a malicious prosecution case as "reasonable grounds for suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious or prudent person in the belief that the party committed the act of which he or she is complaining." In Campbell, the Court of Appeals defined probable cause in a will contest as "the existence of evidence . . .which would lead a reasonable person, properly informed and advised, to conclude . . . "

[5] K.S.A. 1997 Supp. 44-501(d)(2)(C).

9. Because the results of the drug screen are not admissible and, therefore, not part of the evidentiary record, the record lacks other evidence to reasonably conclude that Mr. Ogden's injury was contributed to by his use of drugs or alcohol.

10. Evcon Industries and its insurance carrier argue that the Judge erred by failing to find that Mr. Ogden's functional impairment to the leg was five percent as determined by Dr. Eyster, one of the treating physicians. In support of that argument, Evcon Industries and its insurance carrier quote language used by the Appeals Board in Durham.[6]

> It is unfortunate when the parties elect to abandon the opinions of the treating physicians, instead presenting evidence from hired independent medical examiners. A treating physician would have the opportunity to evaluate an injured worker over a lengthy period of time and could develop an opinion based upon multiple examinations, tests, and a lengthy history of associating with claimant. Independent medical examiners are reduced to reviewing records of other physicians and generally have but one opportunity to examine and evaluate the claimant. As such, it becomes difficult for the trier of facts to place greater emphasis upon one medical opinion over another when independent medical examiners are all that are available.

The above statement recognizes that a treating physician may have an advantage in observing and noting a worker's signs and symptoms. But that advantage does not necessarily result in correctly interpreting and applying the American Medical Association's Guides to the Evaluation of Permanent Impairment. Also, it should be noted that in Durham the treating physician's opinions were not in evidence and the quoted language was used in that context.

Because every situation is unique, it would be improper, and the Board declines, to issue an edict that a treating physician's functional impairment rating should always be given greater weight than the rating of another physician who expresses an equally credible opinion. Durham should not be interpreted to the contrary.

11. As indicated in the findings above, Mr. Ogden has a 16 percent functional impairment to his left lower leg as a direct result of the November 1997 accident. Therefore, he is entitled to receive permanent partial disability benefits for that impairment as provided by the scheduled injury statute.[7]

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[6] Durham v. Cessna Aircraft Company, WCAB Docket No. 196,986 (August 1996).

[7] K.S.A. 1997 Supp. 44-510d.

12. The Workers Compensation Act provides that a worker is entitled to a maximum of 190 weeks of permanent partial disability benefits for a lower extremity injury.[8] As provided by regulation,[9] the number of weeks of temporary total disability benefits due or payable (14) is subtracted from 190 and the resulting number is then multiplied by the functional impairment rating (16 percent). That computation yields 28.16, which is the number of weeks of permanent partial disability compensation that Mr. Ogden is entitled to receive in this claim.

AWARD

WHEREFORE, the Appeals Board affirms the Award dated July 27, 1999 entered by Judge Barnes.

IT IS SO ORDERED.

Dated this ____ day of December 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Thomas E. Hammond, Wichita, KS
Richard J. Liby, Wichita, KS
Nelsonna Potts Barnes, Administrative Law Judge
Philip S. Harness, Director

[8] K.S.A. 44-510d(a)(15).

[9] K.A.R. 51-7-8.